

Income Tax Search and Seizure: Declaration of undisclosed income to “buy peace” does not renders an assessee immunity from initiation and levy of penalty



CA. Mohit Gupta

E: ca.mohitgupta@icai.org

M: 91-9999008009

Introduction:-

The legislature has intentionally drafted the provisions relating to Search and Survey in the statute book of Income Tax Act, 1961 with the target of unearthing the undisclosed income of any person in form of any money, bullion, jewellery or other valuable article or thing.

Search carried out u/s 132 of the Income Tax Act is looked upon by the assessee as a thorough invasion of his privacy. The Powers of the Search operation u/s 132 are much wider than the Survey proceedings as prescribed u/s 133A of the Act.

Even though the ultimate objective for both Search and Survey is same, i.e. to curb the practice of having undisclosed incomes, yet the scope of powers attributed to the officers investigating illustrates the wide dissimilarity.

Under the Income Tax Act, 1961 penalty is to be levied on the amount of “tax sought to be evaded” in respect of the concealment of particulars of income or furnishing inaccurate particulars of the income. Nevertheless, in case of SEARCH penalty is also levied in respect of “Undisclosed Income” too.

CA. Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

The coup de grâce regarding which most assessee are unaware about is that once the disclosure of additional / undisclosed income is made and unaccounted income is admitted in the statement u/s 132(4) of the Act, then same shall be the minimum binding commitment made by him to the department with respect to his unaccounted income subject to being corroborated with evidences unearthed during the course of search. Therefore, an Assessee must be cautious and well aware as to the commitment he is making by admitting the additional undisclosed income in the statement u/s 132(4) of the Act.

The penalty provisions are being regularly strengthened. Counter to this the immunity provisions inbuilt the sections levying the penalty are being made fully non-operative or non-practicable.

Issue under consideration and Analysis:-

It is seen that during the course of search, the assessee admits certain undisclosed income based on incriminating material and/or undisclosed income/assets u/s 132(4) of the act with certain riders though subject to no imposition of penalty such as :-

- Income disclosed voluntarily **"to buy peace"** subject to no imposition of penalty
- Income disclosed voluntarily **"to avoid litigation"** subject to no imposition of penalty
- Income disclosed voluntarily **"in terms of amicable settlement"** subject to no imposition of penalty
- Income disclosed voluntarily with any such rider subject to no imposition of penalty.

Now the question arises as to whether the department is estopped for imposing penalty in such cases where an assessee admits undisclosed with certain riders subject to no penalty particularly there is no provision in the act which provides for such no

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

imposition or any immunity. As per the schema of the act, in case of any detection of undisclosed income during the course of search, penalty is imposed under the Income Tax Act'1961 [Under Section 271AAB for the Specified Previous Year]. It may be a different scenario wherein a forced confession is made by the assessee which is devoid of any detection of undisclosed income. To the contrary, disclosure in 132(4) based on incriminating material unearthed during the search should not in any manner bar the department in imposing the penalty as envisaged under the law.

Nevertheless, it is seen in practice, that at later stages the assessee takes the plea that if an offer has to be taken it has to be in full and not in bit and pieces so far as what is beneficial to the assessee is accepted and what is not beneficial is rejected. The assessee normally presses **promissory estoppel** into service as if the undisclosed income surrendered subject to no penalty is accepted by the department than there is no question of imposition of penalty leading to such surrender as invalid and void ab initio.

The principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have taken place between the parties. The doctrine of promissory estoppel is now well established one in the field of administrative law. The foundation for the claim based on the principle of promissory estoppel in public law was laid by Lord Denning in 1948 in *Robertson v. Minister of Pensions* [1949] 1 KB 227. Prof. De Smith in his *Judicial Review of Administrative Action* (4th edition at page 103) observed that "the citizen is entitled to rely on their having the authority that they have asserted." The doctrine of promissory estoppel has been evolved by the courts, on the principles of equity, to avoid injustice."Estoppel" in Black's Law

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

Dictionary, is indicated to mean that a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly. Section 115 of the Indian Evidence Act is also, more or less, couched in a language which conveys the same expression.

"Promissory estoppel" is defined in Black's Law Dictionary as "an estoppel which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of promisee, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise.

The principle of promissory estoppel was reiterated by Lord Denning in *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] 1 KB 130, when he stated as under (page 136) :

"A promise intended to be binding, intended to be acted on, and in fact acted on, is binding

This principle has been evolved by equity to avoid injustice.

Without prejudice to above, it is equally settled position in law that there cannot be any estoppel against a statute. There is no provision in the statute which permits a compromise assessment. The above position was indicated by the apex court in ***Union of India v. Banwari Lal Agarwal* [1999] 238 ITR 461**. It cannot be laid down as a principle of universal application that whenever an assessment has been completed by accepting the offer of an assessee, no penalty can be imposed.

There were divergent views of the courts on imposition of penalty in such cases, however the issue has achieved certainty to an extent after the landmark Judgment of the apex court in case of ***MAK Data (P.) Ltd.v.Commissioner of Income-tax 38 taxmann.com 448 (SC)*** wherein the court held that there can be no immunity from penalty without specific sanction in law. The court held that the Assessing Officer, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace',

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

'avoid litigation', 'amicable settlement', etc. to explain away its conduct and penalty has to be levied as per law.

Brief facts of the case were as under:-

- For relevant assessment year, assessee filed its return declaring certain income.
- During the course of the assessment proceedings, it was noticed by the Assessing Officer (AO) that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income-tax returns and assessment orders and blank share transfer deeds duly signed had been impounded in the course of survey proceedings conducted in the case of (a sister concern of the assessee).
- By the show-cause notice, the Assessing Officer sought specific information regarding the documents pertaining to share applications found in the course of survey, particularly, bank transfer deeds signed by persons, who had applied for the shares.
- In reply, the assessee made an offer to surrender a sum of Rs. 40.74 lakhs with a view to avoid litigation and buy peace and to make an amicable settlement of the dispute.
- The Assessing Officer completed the assessment wherein amount surrendered was brought to tax, as 'income from other sources'.
- The Assessing Officer also passed a penalty order under section 271(1)(c).
- The Tribunal set aside penalty order holding that the imposition of penalty solely on the basis of assessee's surrender could not be sustained.
- The High Court took a view that in the absence of any *explanation* in respect of the surrendered income, the first part of clause (A) of *Explanation 1* to section 271(1)(c) was attracted. Holding so, the judgment of the Tribunal was set aside and the appeal filed by the revenue was allowed.
- On appeal to the Supreme Court:

The court held as under:-

- *The Assessing Officer, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace', 'avoid litigation', 'amicable settlement', etc. to explain away its conduct.*
- *The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and*

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

assessed income.

- *The burden is then on the assessee to show otherwise, by cogent and reliable evidence.*
- *When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the revenue to show that the amount in question constituted the income and not otherwise. [Para 7]*
- *Assessee has only stated that he had surrendered the additional sum with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department.*
- *Statute does not recognize those types of defences under the Explanation 1 to section 271(1)(c). It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings under section 271(1)(c). The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty. [Para 7]*
- *The surrender of income on this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the Assessing Officer in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary.*
- *The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings.*
- *Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year.*
- *The Assessing Officer, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under section 271, read with section 274. [Para 9]*
- *The Assessing Officer has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the Assessing Officer is not required to record his satisfaction in a particular manner or reduce it into writing. [Para 10]*
- *In view of above, impugned penalty order passed by the High Court deserved to be confirmed. [Para 11]*

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

[This article has been initially published at Taxmann- Citation [2022] 134 taxmann.com 219 (Article) and again re-published only for wider circulation with due permission of the author]

CA.Mohit Gupta can be reached at ca.mohitgupta@icai.org, 91-9999008009 (A-301, Defence Colony , New Delhi-110024).

ABOUT CA. MOHIT GUPTA

Mr. Mohit Gupta is a Fellow Member of the Institute of Chartered Accountants of India, a commerce graduate from prestigious Ramjas College, Delhi University and an alumni of St. Xavier's School, New Delhi. He is practicing as a Chartered Accountant for more than 15 years and managing the Direct Tax Advisory and Litigation practice of M/s. Dhanesh Gupta & Co., Chartered Accountants, New Delhi a renowned Chartered Accountancy firm in the core domain of direct taxation established in 1978.

His forte is handling Income Tax Search and Seizure matters , direct tax litigation matters and legal representations before various authorities enforcing economic and tax laws incl. under PMLA, SFIO, EOW, DRI, SEBI, CCI, Benami Laws and Black Money etc. As on today, he has wide experience of handling Income Tax Search and Seizure Cases across the country, represented matters before the Income Tax Settlement Commission, ITAT and other appellate tribunals constituted under various economic laws. He has been contributing articles in various professional magazines/journals and addressing various seminars on topics relating to Income Tax Search and Seizure, allied tax matters and economic laws. He has to his credit plethora of well researched articles out of which many have appeared in leading journals. In Addition to the above, Mr. Mohit Gupta is also a Special Auditor of the Income Tax Department and has carried out numerous Special Audits across the country on being appointed by the Income Tax Department which have plugged tax evasions, tax base erosion and other tax manipulative practices and in turn facilitated the Income Tax Department to collect huge tax revenues. Mr. Mohit Gupta has also been appointed as Special Auditor under other economic statutes and by other Investigation Agencies of the Government of India. Mr. Mohit Gupta has also authored the periodical Newsletter on Income Tax Search and Seizure. The said newsletter contained well researched write ups / articles and judicial developments on the matters of Direct Taxation.

Mr. Mohit Gupta is also a renowned author on Direct Tax Subjects. His books

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

received extremely overwhelming responses from the readers including the tax payers, tax administration, tax professionals, corporate houses and academicians. The said books were released by erstwhile Hon'ble Union Finance Minister, Shri. Arun Jaitley, Shri.Arjun Ram Meghwal, Minister of State for Finance and the Chairman of Central Board of Direct Taxes and many other dignitaries.

Due to his continuous desire to always rise on the learning curve, he always has a quest and quench to read more, learn more and perform even more.

CA.Mohit Gupta can be reached at ca.mohitgupta@icai.org, 91-9999008009 (A-301, Defence Colony , New Delhi-110024).